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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM H. DENNLER, *et al.*,

Petitioners,

v.

ROBERT S. TRIPPET, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. In our petition, we showed that Congress's enactment of Section 27A requires reversal of the court of appeals' judgment concerning the statute of limitations applicable in Section 10(b) actions, such as this one, filed prior to *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773 (1991). Respondents dispute this proposition (Br. in Opp. 5), contending that "§27A imposes conditions on its application" that assertedly permit the Tenth Circuit's decision to stand despite enactment of the new law. This contention is wholly without merit.

First, respondents assert that Section 27A's reference to "the principles of retroactivity" existing in the relevant circuit on June 19, 1991 supplies an alternative justification for the Tenth Circuit's result by requiring "application of the three *Chevron* tests to the facts of this case." Br. in

Opp. 6 (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971)). Respondents oddly do not explain what the result would *be* under "the three *Chevron* tests." Their argument would thus be ineffective even if their construction of Section 27A were correct, which it is not.

In fact, the phrase concerning "principles of retroactivity" was included in Section 27A to cover cases from those circuits—the Second, the Third, and the Seventh—which had adopted a federal one-year/three-year rule before *Lampf, Pleva* was decided by this Court. *See In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir.) (*en banc*), *cert. denied*, 488 U.S. 849 (1988); *Ceres Partners v. GEL Associates*, 918 F.2d 349 (2d Cir. 1990); *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991). As the principal Senate sponsor of Section 27A stated:

> A number of courts had switched from a "borrowing" approach to a federalized and shortened statute of limitations, but had declined to apply the uniform federalized approach retroactively because of the obvious unfairness of doing so. In those circuits that had declined to apply the shortened [federal] statute retroactively, the courts would continue to be obliged to decline to apply the new rule [recognized in *Lampf*]. *That is the meaning of the phrase*[,] *"including principles of retroactivity."*

137 Cong. Rec. S18624 (daily ed. Nov. 27, 1991) (statement of Senator Bryan) (emphasis added). *See Henley v. Slone*, No. 91-9320, 1992 WL 52602 (2d Cir. Mar. 23, 1992) (interpreting "principles of retroactivity" as used in Section 27A). Because the Tenth Circuit had not adopted the federal one-year/three-year rule prior to this Court's decision in *Lampf, Pleva*, the "principles of retroactivity" language of Section 27A is irrelevant here. *See* Pet. 12-13 & n.7.[1]

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[1] Respondents' reading of this phrase would, not surprisingly, render Section 27A a virtual dead letter. Congress enacted Section 27A for the express purpose of making *Lampf, Pleva* nonretroactive in its

Second, respondents argue that application of Section 27A "will necessarily require a factual analysis of the particular record," including a determination "when the period [of limitations] began to run" (Br. in Opp. 6). We agree. Our petition therefore analyzed the record of this case and demonstrated that petitioners' Section 10(b) claims, considered under Section 27A, *are not time-barred* regardless of which date is chosen as the starting point for Oklahoma's two-year statute of limitations (Pet. 11-14). Respondents have not made the slightest effort to disprove, or even to contest, our demonstration of this point. Their abstract reference to the need for "a factual analysis" is thus a smokescreen, evidently masking an implicit concession that the Tenth Circuit has erroneously denied petitioners their rights under Section 27A.

Respondents next assert that, "even if petitioners were correct regarding the effect of §27A," "[t]he posture of this case" would somehow militate against review because other issues such as damages remain to be decided by the Tenth Circuit on remand should its statute-of-limitations ruling be reversed (Br. in Opp. 6-7). This assertion is confusing at best. Whenever this Court grants certiorari to review a threshold issue—be it jurisdiction, standing, or statute of limitations—the result may be a reversal and remand for consideration of other issues not decided by the court of appeals. The existence of such other unresolved issues has no logical bearing on the propriety of issuing the writ.

Finally, respondents cite the absence of any conflict in the circuits as indicating that this case is not yet "ripe" for this Court's review (Br. in Opp. 6-7). Given the unusual posture of this litigation—Section 27A was enacted after the court of appeals entered its decision, but before its

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application to Section 10(b) cases. *See* 137 Cong. Rec. S17315 (daily ed. Nov. 21, 1991) (statement of Senator Riegle); 137 Cong. Rec. H11810-13 (daily ed. Nov. 26, 1991) (statements of Congressmen Dingell and Markey). On respondents' view, the "principles of retroactivity" phrase would eviscerate this purpose by permitting the courts to hold *Lampf, Pleva* retroactive through application of the *Chevron* test.

decision has become final—it is unlikely that a circuit conflict could *ever* exist on the precise question presented here. But this Court routinely grants certiorari to permit reconsideration of appellate decisions in light of supervening legal developments—most commonly, where this Court itself has issued a decision that calls into question a result reached by a court of appeals. What prompts the grant of certiorari in such cases is not a circuit conflict, but the exercise of this Court's supervisory power and the overriding interests of justice, which mandate that cases be decided under the governing rule of law.

At bottom, respondents' assertions about "ripeness" are the third leg of a campaign to whipsaw petitioners by bringing about a situation in which *no court* can enforce the legislative mandate of Section 27A in this case. Respondents successfully urged the court of appeals not to recall its mandate for the purpose of reconsidering its opinion under Section 27A(a). Respondents contend that the district court is likewise precluded from granting reinstatement relief under Section 27A(b), for, as they acknowledge in a footnote (Br. in Opp. 7 n.3), "[i]t is [their] position that the district court has no jurisdiction to consider petitioners' motion to reinstate since the Tenth Circuit, a higher court, has already denied relief on identical issues."

In urging this Court, for supposed lack of "ripeness," also to deny relief, respondents in effect contend that no court should enforce the rule of decision that Congress has specifically enacted to cover cases such as this. That contention should be rejected, and certiorari should be granted to enable petitioners to receive a judicial hearing and a reasoned decision on the merits of their Section 27A claims.[2]

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[2] Respondents' litany of constitutional challenges to Section 27A (Br. in Opp. 7 n.3), all of which they have raised in the district court in response to petitioners' motion to reinstate, illustrates if anything the importance of this case. Indeed, respondents appear to be implicitly suggesting that the Tenth Circuit may have ruled in their favor *sub*

2.a. As to the second question presented, respondents' effort (Br. in Opp. 8) to harmonize the Tenth Circuit's ruling on "inquiry notice" with the Second Circuit's decision in *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979), is wholly unpersuasive. Whether *Robertson* is characterized as involving fraudulent concealment of a single fraud or two independent frauds is immaterial. The key point is that the Second Circuit held in *Robertson* that the plaintiff's knowledge of an SEC action charging an issuer's underwriters with market manipulation of the issuer's stock did not constitute inquiry notice, as a matter of law, of a separate fraud committed in preparing the issuer's financial statements (609 F.2d at 592). In direct contradiction, the Tenth Circuit has held that petitioners' knowledge of an SEC action charging a narrow range of violations in connection with Home-Stake's 1970 program—

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silentio on one or more of the enumerated constitutional grounds, without briefing, argument or opinion and without notice to the Attorney General as required by 28 U.S.C. § 2403. Respondents evidently regard the Tenth Circuit's refusal to recall its mandate as a ruling on the merits concerning the applicability of Section 27A, for they assert that the court of appeals "has already denied relief on the identical issues" (Br. in Opp. 7 n.3) and has concluded "on three separate occasions" that petitioners' judgments must be reversed (*id.* at 7).

To petitioners' knowledge, there have been at least 22 district court decisions interpreting Section 27A to date. Of those decisions which have considered one or more of the constitutional issues raised by respondents, five have upheld the statute's constitutionality and four have ruled it unconstitutional. For constitutionality are *Bankard v. First Carolina Communications, Inc.*, No. 89-C-8571, 1992 WL 3694 (N.D. Ill. Jan. 6, 1992); *Ayers v. Sutliffe*, No. C-1-90-650, 1992 U.S. Dist. LEXIS 3219 (S.D. Ohio Feb. 11, 1992); *Venturtech II v. Deloitte Haskins & Sells*, No. 88-1012-CIV-5-H (E.D.N.C. Feb. 24, 1992); *TBG Inc. v. Bendis*, No. 89-2423-O (D. Kans. Mar. 5, 1992); *In re Melridge, Inc. Securities Litigation*, No. 87-1426-JU, 1992 U.S. Dist. LEXIS 3477 (D. Ore. Mar. 20, 1992). Against constitutionality are *TGX Corp. v. Simmons*, No. 87-5298 (E.D. La. Mar. 13, 1992), *Bank of Denver v. Southeastern Capital Group, Inc.*, No. 90-B-1551, 1992 WL 59024 (D. Colo. Mar. 20, 1992); *Johnston v. CIGNA Corp.*, No. 90-B-177, 1992 WL 59022 (D. Colo. Mar. 20, 1992); *In re Brichard Securities Litigation*, No. C-87-2987-CAL (N.D. Cal. Mar. 27, 1992). In *Henley v. Slone*, *supra*, the Second Circuit remanded a pending appeal to the district court for consideration of appellees' constitutional challenge to Section 27A.

all of which violations were purportedly cured in a later rescission offer (Pet. 16)—constituted inquiry notice, as a matter of law, to all 1970-1972 Program investors that Home-Stake and its subsidiaries were operating a wholly distinct fraudulent scheme involving the preparation and dissemination of false financial statements during 1964-1972.[3] The conflict between *Robertson* and this case is clear.[4]

b. Respondents' defense of the Tenth Circuit's holding that petitioners were put on inquiry notice of the Home-Stake fraud on April 30, 1971, by the mailing of the rescission offer (Br. in Opp. 9-11), is notable more for what it omits than for what it says. What is omitted is any attempt to refute petitioners' showing (Pet. 14-18) that a reasonable investor would have regarded the court-approved rescission offer as both identifying and curing the limited violations previously alleged by the SEC. Indeed, that is precisely what the jury determined in finding that petitioners lacked notice of Home-Stake's Ponzi scheme until September 1973.

Instead of confronting the Tenth Circuit's fundamental error in treating this issue as one of law, respondents argue disputed evidentiary points which were decided against them at trial and neither addressed nor relied upon

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[3] Respondents are disingenuous in contending (Br. in Opp. 8) that petitioners have changed their position as to the event—the second SEC suit against Home-Stake, as opposed to Home-Stake's bankruptcy filing—that triggered inquiry notice. Both events took place in September 1973; the bankruptcy filing resulted from settlement of the SEC action (T. 3472); and both events were reported in the Wall Street Journal several days apart (App. 28a; T. 1757, 1765-66). The jury did not determine which event put petitioners on inquiry notice, but simply found that petitioners could not have discovered the Home-Stake fraud "until September 1973" (App. 78a-146a).

[4] Respondents' citation of *Arneil v. Ramsey*, 550 F.2d 774 (2d Cir. 1977), as somehow supporting the Tenth Circuit's decision here is wholly inapposite. In fact, by relying in part on the bankruptcy of the securities issuer as imparting notice to the plaintiffs, *Arneil* is consistent with the jury's selection of September 1973 as the notice date in this case.

by the court of appeals. For example, respondents' theory that petitioners gained "constructive knowledge" of the Home-Stake fraud from asserted inconsistencies between projections in program books and prospectuses, from information allegedly derivable from check stubs and tax summaries, and from a footnote in the 1971 prospectus (Br. in Opp. 3-4, 10), was rejected by the jury in answering special interrogatories (App. 78a-146a) and by the trial court in its order denying respondents' statute of limitations defenses (App. 57a-59a). Most importantly, the Tenth Circuit did not discuss, much less rely on, any of this "knowledge" in holding petitioners' 1933 Act claims time-barred by the one-year limitations period of Section 13.

Respondents attack as "incredible" the jury's finding that petitioners should not have discovered the fraud until September 1973, noting that the *Anixter* class action was filed six months earlier (Br. in Opp. 10-11). This is a red herring. As the Tenth Circuit noted, the primary issue is whether the *Anixter* complaint filed on March 30, 1973 is time-barred (App. 39a-40a, 47a), not whether September 1973 rather than March 30, 1973 is the appropriate notice date. There was no evidence at trial that any class representative or any member of the 1970-1972 investor classes (apart from Ivan Anixter himself) had knowledge prior to September 1973 of the filing of the *Anixter* action.[5] Thus, the jury's finding that the 1970-1972 class members should not have discovered their claims prior to September 1973 is both reasonable and consistent with the Second Circuit's decision in *Robertson v. Seidman & Seidman*, 609 F.2d 583, 586, 591-92 (2d Cir. 1979) (plaintiff's knowledge of and involvement in prior action not determinative on notice issue).

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[5] Ivan Anixter, the original named plaintiff in this case, voluntarily dismissed with prejudice his Section 11 claim against the only respondent affected by the issue whether March 30, 1973 or September 1973 is the applicable notice date (Doc. 2709). Similarly, there is no evidence in the record of knowledge by any class representative or class member of the six prior suits against Home-Stake referred to by respondents (Br. in Opp. 11) and the Tenth Circuit did not rely on those suits in support of its ruling (App. 45a).

c. Respondents concede that, under the Seventh Amendment, an appellate court may properly reverse a jury verdict only where the material facts and the inferences to be drawn therefrom are either undisputed or point so strongly in favor of the appellant that reasonable persons could draw no other conclusion (Br. in Opp. 12). Moreover, in reviewing the evidence, this Court has held that courts of appeal are "bound to view the evidence in the light most favorable to [the prevailing party below] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

Even if one assumes *arguendo* the reasonableness of the inferences that the Tenth Circuit, in ruling against petitioners, drew from the 1971 SEC action and ensuing rescission offer (Br. in Opp. 13), respondents make no effort to show that the contrary inferences urged by petitioners (Pet. 16-18) are not ones that a reasonable jury could *also* draw. Absent such a showing, the Tenth Circuit's holding on "inquiry notice" constitutes a clear violation of the Seventh Amendment and of this Court's standards for appellate review of jury verdicts.

3. As to the third question presented, respondents contend that the doctrine of equitable estoppel does not apply here because its application is confined to situations where a defendant fraudulently induces a plaintiff to fail to file a known cause of action in a timely manner (Br. in Opp. 14-15). In so arguing, respondents seek to defend the Tenth Circuit's ruling on a ground different from that upon which the court itself relied. The court of appeals held that equitable estoppel is unavailable *per se* in any Section 13 case (App. 38a), not that the facts of this case do not warrant its application.[6]

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[6] Respondents also assert (Br. in Opp. 16) that numerous circuits have rejected the application of equitable estoppel to Section 13, citing *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 2887 (1991). In fact, other than dictum in *Short* itself,

More importantly, neither respondents nor the authorities they cite suggest any reason why the principle behind equitable estoppel—"that no man may take advantage of his own wrong," *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-33 (1959)—should apply to revive a time-barred lawsuit where a plaintiff has been lulled into letting the statute of limitations run on a known cause of action, yet not apply where the plaintiff's failure to file a timely suit was procured by the defendant's active fraud in keeping the plaintiff ignorant of the relevant facts. In both situations the defendant has fraudulently obtained the benefit of a time bar by conduct separate and apart from the acts that gave rise to the original cause of action. Indeed, the defendant's fraud in the latter case is more egregious: by keeping plaintiffs in the dark about the very *existence* of their cause of action, the defendant absolutely deprives them of any opportunity to sue. Neither the Tenth Circuit in this case nor the Seventh Circuit in *Short* has proffered any principled basis for invoking equitable estoppel in the circumstances presented by *Glus*, yet not invoking that doctrine in circumstances like those here, which include a calculated pattern of fraud on both the SEC and the district court which issued the 1971 consent injunction against Home-Stake, as well as on petitioners. *Compare Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46 (1944) (vacating final judgment for fraud on the Patent Office and on the court of appeals).[7]

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none of the cases cited in *Short* involved the application of equitable estoppel in a Section 13 action. *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1308 (9th Cir. 1982) and *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 968 (5th Cir. Unit B 1981), *cert. denied*, 458 U.S. 1106 (1982), both involved equitable tolling not equitable estoppel. And *Darms v. McCulloch Oil Corp.*, 720 F.2d 490, 494 (8th Cir. 1983) and *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1043 n.7 (10th Cir. 1980), interpreting the substantially identical three-year limitations period contained in the Interstate State Land Sales Full Disclosure Act, 15 U.S.C. § 1711 (1976) (amended 1979), stated that equitable estoppel could apply in a proper case.

[7] *See* the discussion of the breadth of the equitable estoppel doctrine in Symons, *Pomeroy's Equity Jurisprudence*, §§ 802-805 (5th ed. 1941).

This Court should grant certiorari to make clear that its decisions in *Glus* and *Hazel-Atlas* are not so limited.

CONCLUSION

For these reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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The necessity for fraudulent acts by a defendant that are separate and apart from the initial misrepresentations in the sale of a security is the answer to the Seventh Circuit's rhetorical question about the necessity for the three-year bar to be absolute. *See Short*, 908 F.2d at 1391, quoted at App. 38a. Where the one-year period of Section 13 has not run because the plaintiff has no basis for discovering a misrepresentation or omission, the three-year statute of limitations will protect any defendant who has not actively and fraudulently concealed the misrepresentation or omission.